

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re United States Patent of:
Edward James Rozhon *et al.*

Patent No.: 7,341,744

Issued: 11 March 2008

For: Method of Treating Secretory Diarrhea with
Enteric Formulations of Proanthocyanidin
Polymer

Office of Patent Legal Administration
Room MDW 7D55
600 Dulany Street (Madison Building)
Alexandria, VA 22314

REQUEST FOR RECONSIDERATION OF PATENT TERM ADJUSTMENT

Sir:

We are in receipt of the Decision Upon Remand and Reconsideration of Patent Term Adjustment and Notice of Intent to Issue Certificate of Correction (the “PTA Recalculation Decision”) dated February 20, 2013 for U.S. Patent No. 7,341,744 (the “744 patent”). The PTA Recalculation Decision asserts that the Patentee is entitled to 452 days of patent term adjustment (“PTA”).

We seek reconsideration of the PTA Recalculation Decision on several grounds.

First, as acknowledged in the PTA Recalculation Decision, Patentees have not received the benefit of final rule, *Revision of Patent Term Adjustment Provisions Relating to Appellate Review* (77 FR 49354) issued on August 16, 2012. Patentees agree that they are entitled to an additional period of 265 days of B Delay for time consumed by appellate review, and respectfully request that the PTA be recalculated for the ‘744 patent on this basis. The additional 265 days of B Delay should increase the total PTA to 717 days.

Second, Patentees believe that errors by the Patent Office in relation to the treatment of the abandonment period beginning June 19, 2001 unfairly cost the Patentees additional patent term. Specifically, the period of applicant delay attributable to the abandonment of the underlying application should be significantly less than 641 days. Patentees agree that the period of applicant delay begins as of June 19, 2001, but respectfully disagree that this period extends to March 21, 2003. On July 3, 2002, Patentees filed a petition under 37 C.F.R. § 1.137(b) to revive the abandoned application. On September 12, 2002, the USPTO dismissed the petition on the basis that Patentees had allegedly failed to submit an oath or declaration executed by all of the inventors named in the application. However, Patentees had, in fact, submitted with the application as filed a declaration executed by all inventors. The timely submission of such a declaration is evident from the March 17, 2003 Request for Reconsideration of Petition to Revive Application under 37 C.F.R. § 1.6(d). Because the July 3, 2002 petition was complete when filed, the USPTO should have granted rather than dismissed this petition on September 12, 2002. Accordingly, the period of applicant delay attributable to the abandonment of the application should run only from June 19, 2001 through September 12, 2002, a period of 450 days. Patentees should not lose term due to this error by the Patent Office. Rather than 641 days of delay, Patentees believe that the delay should only be 450 days, resulting in an additional 191 days of patent term adjustment, and thus bringing the total PTA to 908 days.

Finally, on September 27, 2006, Patentees filed a Request for Continued Examination (“RCE”) after the three-year pendency period had concluded. The ‘744 patent issued on March 11, 2008. The period of time from September 27, 2006 through March 11, 2008 was not included by the USPTO as part of the calculation of B Delay. This period is cognizable B Delay because the filing of an RCE after the three year deadline has passed has no effect upon the accrual of B Delay. *Exelixis, Inc. v. Kappos*, Case No. 1:12-cv-00096, 2012 U.S. Dist. LEXIS 157762 (EDVa Nov. 1, 2012). Thus, Patentees respectfully request that the period of B Delay be increased by an additional 531 days, thus bringing the total PTA that Patentees are entitled to 1439 days.

The Commissioner is hereby authorized to charge any fees associated with the filing of this communication to our Deposit Account No. 50-4876, under Order No. 119557-03305, from which the undersigned is authorized to draw.

Dated: February 20, 2013

Respectfully submitted,

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